UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

INTERSCOPE RECORDS, et al.

Plaintiffs,

-versus- 07-CV-108

(MOTION HEARING - DECISION)

WILLIAM KIMMEL

Defendant.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York 12207, on MONDAY, DECEMBER 10, 2007, before the HON. THOMAS J. MCAVOY, United States District Court Senior Judge.

APPEARANCES:

FOR THE PLAINTIFFS:

HOLME, ROBERTS LAW FIRM - BOULDER OFFICE

BY: TIMOTHY M. REYNOLDS, ESQ.

FOR THE DEFENDANT:

OFFICE OF RICHARD A. ALTMAN

BY: RICHARD A. ALTMAN, ESQ.

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

(Court commenced at AM.)

THE CLERK: Interscope Records, et al versus William Kimmel, 2007-CV-108. May we have the appearance on behalf of the plaintiff.

MR. REYNOLDS: Good morning, your Honor. Tim Reynolds on behalf of plaintiffs.

THE COURT: Good morning, Mr. Reynolds.

THE CLERK: On behalf of the defendant, please.

MR. ALTMAN: Richard A. Altman.

THE COURT: All right. Defendant is moving here to dismiss under the Rule 41 two dismissal rule, for attorneys' fees, for costs, and for sanctions. Why should that happen in this case?

(Oral argument heard...)

(Bench decision rendered, as follows:)

THE COURT: Okay. Plaintiffs, the copyright owners or exclusive licensees of copyrighted sound recordings commenced the instant action pursuant to the copyright laws of the United States, 17 U.S. Code Section 101, et seq, claiming that the defendant William Kimmel has used and distributed copyrighted material in violation of plaintiffs' exclusive rights.

Presently before the Court is defendant's motion to dismiss based on the two dismissal rules contained in Federal Rule of Civil Procedure 41.

The relevant facts are as follows: Plaintiffs commenced an action against various Doe defendants in the Western District of New York in April of 2005. Given the nature of the claims at issue here, sharing of copyrighted materials via the Internet by unknown computer users, plaintiffs had little choice but to commence an action against unspecified defendants in the Western District of New York where the relevant Internet service provider, the Rochester Institute of Technology, was located. Through information obtained from a subpoena, plaintiffs learned that one of the likely computer users was defendant William Kimmel. Consequently, plaintiffs sent defendant a letter advising him that he had, quote, been sued by a number of record companies for copyright infringement, close quote. The letter further stated that, quote, although you have already been sued, you have not been named as a defendant, close quote. Plaintiffs ultimately voluntarily dismissed the action pursuant to Rule 41(a)(1) in August of 2005.

Thereafter, in January 2006, plaintiffs commenced a second action against William Kimmel in the District of Maryland. That action was dismissed in May of 2006 by Court order pursuant to Rule 4(m) for failure to timely effectuate service. Plaintiffs commenced a third action against William Kimmel in the District of Maryland in May of 2006. The Court issued a notice to plaintiffs

indicating that it had not received proof of service and that if proper proof was not filed within 120 days after filing the complaint, the Court, upon its own motion, would dismiss the complaint. In response to the notice, plaintiffs dismissed the action pursuant to Rule 41(a)(1).

Plaintiffs then commenced the instant action in January 2007. Defendant now seeks dismissal pursuant to Rule 41 two dismissal rule. Plaintiffs respond that dismissal is inappropriate because, one, the first dismissal was an action against John Doe, not plaintiff; two, the second decision was by court order and not a voluntary dismissal; three, that there are additional plaintiffs in the instant case that were not included in the prior cases; and four, the third dismissal was an action erroneously commenced against plaintiff's father who shares an identical first and last name with plaintiff himself -- not plaintiff himself. So they're both named William Kimmel.

As to the second dismissal, the Court agrees with plaintiffs that it does not count for purposes of the two dismissal rule. The rule only applies to voluntary dismissal under Rule 41(a)(1), not court ordered dismissals. See ASX Investment Corporation versus Newton, 183 F.3d 1265, at 1268. The question that remains is whether the other suits operate as dismissals against defendant that would invoke application of the two dismissal rule.

As the Second Circuit stated, it seems to be universally accepted that the primary purpose of the two dismissal rule is to prevent an unreasonable use of plaintiff's unilateral right to dismiss an action prior to the filing of the defendant's response of pleading. The two dismissal rule is an exception to the general principle contained in Rule 41(a)(1) and honored in equity prior to the adoption of the federal rules that a voluntary dismissal of an action does not bar a new suit based upon the same claim. Where the purpose behind the two dismissal exception would not appear to be served by its literal application and where that application's effect would be to close the courthouse doors to an otherwise proper litigant, the Court should be most careful not to construe or apply the exception too broadly. The entire purpose of the rule was to strike from judges and litigants useless shackles of procedure to the end that a fair trial the essential questions would be had. The basic purpose of the federal rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. Poloron Products Incorporated versus Lybrand Ross Brothers & Montgomery, 534 F.2d 1012, at 1017. The purpose of the two dismissal rule is to prevent unreasonable abuse and harassment by a plaintiff securing numerous dismissals without prejudice. Sutton Place Development Company versus Abacus Mortgage Investment Company,

826 F.2d 637, at 640. The rule is not to be construed too broadly. ASX Investment Corporation, at 183 F.3d 1267. There are circumstances when due regard for the underlying policy concerns of the rule may require that the Court depart from the precise language of the rule. Sutton Place, 826 F.2d at 840.

Here, there's no evidence of an intent to harass by plaintiffs. Similarly, there's no indication that plaintiffs are abusing the system. The undisputed evidence before the Court is that the dismissals were effectuated due to service of process issues or issues relating to venue. As noted, given the nature of these types of claims, plaintiffs had little choice but to commence litigation in the Western District of New York in the fashion it did. While plaintiffs could have been more diligent in their attempts to effectuate service on defendant, locating defendant proved difficult because of his admitted moves between Rochester, New York, Gambrillis, Maryland, a temporary residence in Binghamton, New York, and constant going back and forth between the two places. See Kimmel affidavit at paragraph two.

Thus, for example, after commencing the first lawsuit and serving a subpoena on the Internet service provider, plaintiffs learned of defendant's identity and obtained an address for him at 207 Heatherbloom Trail, Gambrillis, Maryland. During that time, defendant, who was a

student, was between Rochester, New York, and Gambrillis, Maryland, ultimately returning to Maryland. Shortly after the second suit was commenced, which was filed in the District of Maryland, the defendant moved to Binghamton, New York. By his own admission, defendant moved to a temporary residence with a friend while he looked for a permanent place to live. For the next several months, defendant was frequently going back and forth between the two places to move his possessions. Kimmel affidavit at paragraph 2.

The same situation was presented with respect to the third suit, which was also filed in the District of Maryland. Based on this record, it cannot be said that plaintiffs' reasons for discontinuing the prior suits was unreasonable or intended to a harass or annoy defendant. In addition, defendant has actively participated in this litigation, including asserting counterclaims for more than ten months prior to raising his two dismissal claims. After plaintiffs commenced the action, defendant appeared, answered and served counterclaims. One of the defendant's counterclaims sought a declaration of noninfringement. This counterclaim was a mere image of the complaint which asserted claims of infringement. Thus, plaintiffs wanted a judgment of infringement, while the defendant wanted a judgment of noninfringement. Through this counterclaim, the defendant affirmatively sought to litigate the issue whether he

infringed upon plaintiff's copyright, the very same issue that is subject of plaintiffs' claims.

In May of 2007, plaintiffs moved to dismiss defendant's counterclaim instead of filing a cross-motion seeking dismissal of the complaint by reason of the two dismissal rule which, if successful, likely would have mooted the counterclaims. Defendant argues that his counterclaims seeking a judgment of noninfringement should proceed. That's what he argues. Such a position is contrary to the notion that the copyright infringement issue was already adjudicated in defendant's favor by operation of the two dismissal rule and that the instant action is barred by res judicata. Indeed, on the motion to dismiss, defendant argued that plaintiffs should not be able to abandon their claims and leave the issue undecided. Defendant's memorandum of law at 6. Defendant contended that plaintiffs were attempting to prevent the determination of the merits by attempting to withdraw the complaint without prejudice. Defendants argued that in such an instance, a declaratory judgment counterclaim should be permitted to stand because it's the only means by which a defendant can have his day in court and obtain a judgment of noninfringement. Defendant's memorandum of law at 5. Again, if defendant believed the instant action to be precluded by res judicata, he would not have needed to assert and defend against dismissal of his counterclaims or argue

that the underlying copyright infringement issue remains outstanding or that defendants should not be permitted to prevent determination of the merits. Rather, defendant could have moved to dismiss this entire action under Rule 41(a) and the principles -- under the principles of res judicata and then, rest assured, that he would be protected from future suits based on the conduct at issue here. These facts weigh against application of the two dismissal rule.

Further, while defendant raised the two dismissal rule as an affirmative defense in his answer, he waited to move for dismissal on this ground until significant activity transpired in this case until ten months after the complaint was filed. Under the Uniform Pretrial Scheduling Order issued in this case, Rule 26(a)(1), mandatory disclosures were to be exchanged by July 30, 2007, and all discovery was directed to be completed on or before December 31, 2007. The discovery period was nearly over and defendant engaged in discovery by the time defendant moved to dismiss.

In addition, the Court notes that the third dismissal was prompted by a notice by the District of Maryland stating that if service was not timely effectuated or extension of time sought, the case would be dismissed on the Court's own motion. In light of the fact that the Court's notice requested a prompt response, service had not been

effectuated. The defendant had not been located in Maryland and it may have made more sense to pursue litigation in the district that the defendant was found. It was not unreasonable for plaintiffs to have withdrawn the action. Plaintiffs could have ignored the District of Maryland's notice and request for a response and waited for the Court to dismiss the action on its own. This Court sees little reason why plaintiffs should be punished for responsibly responding to the court's notice.

Principles of equity weigh against allowing defendant to assert the two dismissal rule ten months after the filing of the complaint and after taking advantage of the discovery process and affirmatively litigating the right to proceed on the counterclaims.

For all the foregoing reasons, the Court finds that the purpose behind the two dismissal exception would not appear to be served by its literal application and that the effect would be to close the courthouse doors to an otherwise proper litigant. Poloron, 534 F.2d at 1017. Courts have long noted preference for adjudication on the merits and not permitting victories based on mere technicalities. Poloron, at 1017. The facts and circumstances of this case warrant resolution on the actual merits, not victory by overtechnical application of the rules. That being said, going forward, plaintiffs should take special care to strictly adhere to the

rules of procedure and the local rules of this Court.

Accordingly, defendant's motion to dismiss is denied. Because defendant has not been determined to be a prevailing party and the Court has found the two dismissal rule not to apply here, the motion for attorneys' fees, costs, and sanctions are also denied.

Plaintiff shall submit an order on notice to defendant within 11 days of today's date.

Thank you both for an interesting argument.

Court stands adjourned in this matter.

MR. REYNOLDS: Your Honor, may I address one other issue? In the Court's order setting this date as the motion date, the Court indicated the parties would have 30 days to complete discovery from this date. We would ask that that be extended to 60 days, given the holiday, and also given that we didn't get discovery responses, waited three months for discovery responses; the deposition was set in late November, now we've waited an additional time to take the deposition; together with the upcoming holidays, we request 60 days to complete discovery.

THE COURT: What's the defendant say about that?

MR. ALTMAN: I take no position on it one way or the other.

THE COURT: We'll give you 60 days. Make sure

you notify the Magistrate Judge.

MR. REYNOLDS: Thank you, your Honor.

THE COURT: Court stands adjourned.

(Court adjourned at 11:10 AM.)

* * * * *

CERTIFICATION

I, BONNIE J. BUCKLEY, RPR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and caused the same to be transcribed; that the foregoing is a true and correct transcript of the same and whole thereof.

BONNIE J. BUCKLEY, RPR

USDC Court Reporter - NDNY

DATED: DECEMBER 30, 2007

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY